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No. 93-1340

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

GARY MEZZANATTO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Rule 11(e)(6) of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence provide that statements made in the course of plea discussions with an attorney for the government that do not result in a plea of guilty ordinarily may not be admitted against the defendant who made the statements. The question presented in this case is whether the government may use such statements to impeach the defendant's contrary testimony at trial, when the defendant and his counsel expressly agreed before those statements were made that the government would have the right to use the statements in that manner.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 998 F.2d 1452.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1993. A petition for rehearing was denied on November 9, 1993. Pet. App. 20a. On January 28, 1994, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 9, 1994. The petition was filed on February 22, 1994, and was granted on April 18, 1994. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

RULES INVOLVED

Rules 102 and 410, Fed. R. Evid.; and Rules 2 and 11(e)(6), Fed. R. Crim. P., are reproduced in the appendix to this brief.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, respondent was convicted of possessing methamphetamine, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 170 months' imprisonment, to be followed by 60 months' supervised release. The court of appeals reversed. Pet. App. 1a-19a.

1. On the morning of August 1, 1991, San Diego Narcotics Task Force (SDNTF) agents arrested Gordon Shuster during the execution of a search warrant at a Rainbow, California, residence where Shuster operated a clandestine laboratory for manufacturing methamphetamine. Shuster agreed to cooperate with the SDNTF agents in apprehending others involved in the methamphetamine trade. Tr. 101-106, 152-156.

That afternoon, Shuster placed a call to respondent's pager. When respondent returned Shuster's call, Shuster said that one of his friends wished to purchase a pound of methamphetamine for $13,000, and that the friend would "front" additional money toward the purchase of a second pound of methamphetamine to be delivered later. Shuster made arrangements to meet respondent later that day, and the two met at a local restaurant that evening. Tr. 108-109, 113-114, 121-129.

In the course of the meeting, Shuster introduced respondent to an undercover officer who was posing as Shuster's "friend." The officer asked respondent if

he had "brought the stuff with him," to which respondent replied that it was in his car. Respondent and the officer then went to the car, where respondent pointed to a brown paper package. The officer inspected the package, which contained approximately one pound of methamphetamine, and asked how long it would take to produce the second pound. Respondent replied that it would take about six hours. Respondent then took out a glass pipe (later found to contain methamphetamine residue), pointed to the package, and asked the officer if he wanted to take a "hit"—*i.e.*, smoke some of the methamphetamine. The officer replied that he would first get the money. The officer then left the car and gave a pre-arranged arrest signal. Respondent was arrested. Tr. 130-138, 228-229.

2. On October 17, 1991, respondent and his attorney requested a meeting with the Assistant United States Attorney (AUSA) prosecuting the case to discuss respondent's participation in the offense, with a view to offering his cooperation to the government. The AUSA agreed to meet with respondent and his attorney, and the meeting took place on that day. Two SDNTF agents who were familiar with the investigation were also present. Tr. 359, 365-367; J.A. 91, 96-98.

The AUSA began the meeting by emphasizing that respondent was under no obligation to talk, but that if respondent wanted to cooperate with the authorities, he would have to be completely truthful. The AUSA advised respondent that statements he made during that proffer session would not be used as evidence in the government's case-in-chief if respondent proceeded to trial, but that the government's willingness

to entertain respondent's proffer was conditioned on his agreement to allow the government to use his statements in other ways. Specifically, the government would be permitted to use those statements in a subsequent perjury or false statements prosecution, and to impeach respondent's testimony if he went to trial and gave testimony that differed from the statements he made at the meeting. After the AUSA gave respondent an opportunity to discuss the government's terms with his attorney, respondent and his attorney agreed to them. Tr. 323-324, 358, 366-367, 369-370; J.A. 64-65, 90-91, 96-98, 99-100.

Respondent then stated that he had dealt only in ounce quantities of methamphetamine prior to his arrest, but that he knew that the package he attempted to sell to the undercover officer contained methamphetamine. Respondent initially claimed that he was merely acting as a broker for Shuster, and that he had not known that Shuster was manufacturing methamphetamine on the Rainbow property. Later in the meeting, however, respondent admitted that he had known that Shuster was engaged in the manufacture of methamphetamine, and that he had helped Shuster move glassware used in that process. Respondent then sought to minimize his involvement in the operation by claiming that he had not visited the Rainbow property for at least a week before his arrest. The SDNTF agents confronted respondent with surveillance evidence showing that his car was on the Rainbow property the day before the arrest—and that respondent's contrary claim was therefore a lie. Citing respondent's failure to provide completely truthful information, the AUSA terminated the meeting. Tr. 181, 367-369; J.A. 97-99.

3. Respondent took the stand in his defense at trial. He gave an elaborate account of his relationship with Shuster, in which he claimed that he had helped Shuster with various projects in the belief that Shuster worked for the Central Intelligence Agency (CIA). Respondent purportedly believed that Shuster was using the Rainbow property to manufacture plastic explosives for the CIA. Respondent also claimed that he had obtained a pager at Shuster's request, in order to allow Shuster to contact him when Shuster had projects for him to carry out, and that Shuster had instructed him to list the pager under a fictitious name to prevent anyone from tracing respondent's connection to Shuster. Tr. 265-267, 276-280, 303, 305-307; J.A. 20-21, 28-32, 49, 50-52.

Respondent testified that he was not involved in methamphetamine trafficking, and that he did not know that the package he delivered to Shuster contained methamphetamine. Instead, respondent claimed that he received the package from Shuster the day before his arrest, that Shuster expressed concern at that time that the neighbors were becoming "nosey" about his explosive-making activities, and that respondent had accordingly surmised that the package contained plastic explosives. Respondent also testified that Shuster paged him repeatedly on the day of his arrest to arrange for delivery of the package, and that respondent agreed to deliver it in exchange for $1,300. Respondent explained his conversation with the undercover agent by stating that he was just "playing along" and that it was "Gordon[] [Shuster's] deal." Tr. 275-278, 282-288, 312-315, 334-335; J.A. 28-30, 33-38, 55-58, 72-74.

On cross-examination, the prosecutor, over objection, questioned respondent about his inconsistent statements at the October 17, 1991, meeting and about his failure to advert to Shuster's purported CIA connections at that time. Respondent denied having stated that he knew the package contained methamphetamine, or that he had trafficked in ounce quantities of methamphetamine. Tr. 290-295, 318-322, 351-352; J.A. 39-43, 60-64, 85-87. The government then called one of the agents who was present at the meeting. The agent recounted respondent's prior inconsistent statements. Tr. 365-371; J.A. 96-101. The jury found respondent guilty.

4. A divided panel of the court of appeals reversed. The court began by noting that Federal Rule of Criminal Procedure 11(e)(6) and Federal Rule of Evidence 410 are both "quite clear" that a statement made in the course of plea discussions with the attorney for the government is "not * * * admissible against the defendant" except (i) when another statement made in the same discussions has been introduced and the statement in fairness should be considered with it, and (ii) in certain prosecutions for perjury or false statement. Citing *United States* v. *Lawson*, 683 F.2d 688 (2d Cir. 1982), the court concluded that the language rendering such plea discussions "not admissible," read in light of its legislative history, bars the use of such statements to impeach the defendant. Because neither of the exceptions to the rules applied, the court held that the rules barred the admission of the statements made by respondent during the October 17, 1991, proffer session. Pet. App. 4a-5a.

The court next concluded that a defendant may not waive the protections of Rules 11(e)(6) and 410, even when he agrees to do so with the advice of counsel. In the court's view, "candid and effective plea bargaining could be severely injured" if the rules were subject to waiver, because waiver "could easily have a chilling effect on the entire plea bargaining process." Pet. App. 7a. The court rejected the government's submission that a defendant may waive his rights under the rules just as he may waive constitutional rights, explaining that judicially created waivers of constitutional rights are "an inescapable feature of courts interpreting the Constitution by defining the right being asserted." *Id.* at 9a. By contrast, "[t]o write in a waiver in a waiverless rule promulgated by the Supreme Court and Congress * * * is not an inescapable duty. It more resembles unwelcome advice." *Ibid.* Finally, the court stated that "the government should not be given the ability to extract a waiver of [the] rules from a defendant who is in a weak bargaining position," because "[w]ith such a high entry cost, defense attorneys will be deterred from seeking plea bargains, and this will frustrate Congressional policy." *Ibid.*

Chief Judge Wallace dissented. He noted that criminal defendants may waive the most fundamental rights afforded them by the Constitution, and that it is therefore anomalous to create "a per se rule which invalidates any and all waivers of the protections afforded * * * by" Rules 11(e)(6) and 410. Pet. App. 12a. Chief Judge Wallace also disagreed with the majority's contention that to permit the government to obtain a waiver would undermine the policy underlying the Rules. He noted that the only

"rights" a defendant waives are the "right" to lie at some stage of the prosecution and the "right" to engage in plea bargaining, neither of which is truly a "right." *Id.* at 14a-15a (citing, *inter alia*, *Nix* v. *Whiteside*, 475 U.S. 157, 173 (1986)).

Chief Judge Wallace also found speculative the majority's concern that waivers may reduce the incidence of plea bargaining, and he rejected the majority's assumption that its absolute rule against waiver was needed to avoid abuses by the government. He noted that in *Town of Newton* v. *Rumery*, 480 U.S. 386 (1987), this Court emphasized its unwillingness to assume that prosecutors will engage in wrongdoing, and the Court upheld an agreement in which an arrestee waived his right to pursue a civil rights action in exchange for dismissal of all criminal charges against him. Chief Judge Wallace explained that, unlike the defendant in *Town of Newton*, who "gave up a potentially legitimate civil rights suit," respondent merely "gave up his ability to provide inconsistent testimony." Pet. App. 19a.

SUMMARY OF ARGUMENT

The court of appeals erred in ruling that a defendant may never agree to waive his rights under Rules 11(e)(6) and 410, even when he does so upon the advice of his counsel. That conclusion finds no support in the text of Rules 11(e)(6) and 410 or in the general considerations of public policy on which the court of appeals relied.

A. The language of Rules 11(e)(6) and 410 refutes the view that Congress intended to enact a "waiverless rule," because it provides that evidence may not be admitted "against the defendant." In other contexts, this Court has found that language that confers

rights upon a party to litigation creates personal rights in that party, which that party may therefore waive if he should find it advantageous to do so. That Congress intended to permit waiver of the inadmissibility of plea statements is confirmed by the fact that the Federal Rules of Criminal Procedure and Evidence each incorporate basic principles of forfeiture. As the court of appeals recognized, those principles preclude a defendant from obtaining reversal based on the admission of plea statements if the defendant failed to object at trial. Yet the court of appeals did not explain why it is sensible to believe that Congress intended to authorize such "implicit" waivers, but to forbid counseled, knowing, and explicit ones.

Respondent derives no help from cases decided under the Fair Labor Standards Act (FLSA), on which he heavily relies. Those cases confirm that whether a statutory right may be waived depends on the intention of Congress as manifested in the particular statute. Rights conferred by the FLSA are not subject to waiver because the structure and history of that Act demonstrate that its whole point was to prevent certain types of private employment contracts, and because individual waivers would exert a downward pressure on wages and thereby adversely affect the interests of others. By contrast, respondent cannot establish that the language, structure, or history of Rules 11(e)(6) and 410 demonstrates a congressional intent to forbid waiver, nor has he seriously suggested that a decision by an individual defendant to waive the inadmissibility of his plea discussions for impeachment purposes implicates the rights of *other* defendants.

B. There is no sound public policy reason for denying enforcement to respondent's agreement. The court of appeals was wrong to conclude that plea bargaining will be hampered by agreements that permit the government to use a defendant's plea statements for the limited purpose of impeaching his later contrary testimony at trial. Because plea bargaining is a two-sided process, that process is most likely to be advanced when the parties themselves are permitted to agree on the terms on which it will be conducted.

The court of appeals' assessment of the relevant public policies also overlooked the importance of the cooperation context in which respondent made his statements—a context that differs from traditional plea bargaining in significant respects. Most importantly, the fact that the information conveyed by the defendant is intended for use in other prosecutions and investigations (including potentially life-threatening undercover work) gives the prosecutor a compelling interest in its veracity that is not present in traditional plea bargaining. The agreement condemned by the court of appeals furthers that compelling interest by providing some assurance that a would-be cooperating witness will take seriously his obligation to give a truthful proffer. That agreement is also an important inducement in persuading prosecutors to meet with would-be cooperators, because such meetings require substantial law enforcement resources and cannot be held for all defendants who express a possible interest in cooperation. The court of appeals permitted respondent to obtain the full benefit of his bargain—the opportunity to meet with the prosecutor and agents—while completely relieving him of any obligation to comply with his side of the deal.

Finally, the court of appeals' ruling seriously disserves the compelling public interests in the truth-finding function of the trial and in the punishment of the guilty, because it permits criminal defendants to turn the purported unwaivability of Rules 11(e)(6) and 410 into a license to commit perjury, and to present tailored defenses insulated from effective challenge. That result cannot be reconciled with the basic canon that governs interpretation of evidentiary provisions—*i.e.*, that they "shall be construed to secure fairness in administration * * * to the end that the truth may be ascertained and proceedings justly determined." Fed. R. Evid. 102.

ARGUMENT

RESPONDENT'S AGREEMENT WAIVING HIS RIGHTS UNDER RULES 11(e)(6) and 410 IS VALID AND ENFORCEABLE

The issue in this case is whether courts may enforce an agreement that gives the government the right to impeach a defendant's trial testimony with earlier inconsistent statements made by him during plea negotiations. The Ninth Circuit held that the courts may not do so, even when the defendant expressly agrees to permit such impeachment on the advice of counsel and before plea discussions commence, in order to induce the government to participate in those discussions.

The Ninth Circuit first concluded that Rules 11(e)(6) and 410, which provide that statements made during plea discussions ordinarily are "not admissible," do not themselves authorize the use of such

statements for impeachment. We agree with that conclusion, which is consistent with the views of other courts of appeals that have considered the same question. See *United States* v. *Dortch*, 5 F.3d 1056 (7th Cir. 1993), petition for cert. pending *sub nom. Suess* v. *United States*, No. 93-7218 (filed Dec. 20, 1993); *United States* v. *Lawson*, 683 F.2d 688 (2d Cir. 1982).

We disagree, however, with the Ninth Circuit's further conclusion that a defendant may never validly agree to forgo his rights under Rules 11(e)(6) and 410; a waiver of that sort, the court held, is contrary to the public policy in favor of plea bargaining. In so ruling, the Ninth Circuit parted company with other circuits that have upheld the validity of such waivers. See *United States* v. *Dortch*, 5 F.3d at 1067-1068; *United States* v. *Perrone*, 936 F.2d 1403, 1412, clarified on other grounds on reh'g, 949 F.2d 36 (2d Cir. 1991); see also *United States* v. *Stevens*, 935 F.2d 1380, 1396 (3d Cir. 1991) (noting that such waivers are common in plea agreements).

In our view, the language of Rules 11(e)(6) and 410, and well-settled forfeiture principles that are incorporated in the Rules of Criminal Procedure and Evidence, refute the view that Congress intended to forbid all waivers of a defendant's rights under Rules 11(e)(6) and 410. In addition, respondent has no valid public policy defense to enforcement of his agreement with the government. Accordingly, his waiver of rights under those rules should be enforced.

A. The Protections of Rules 11(e)(6) and 410 May Be Waived By A Defendant's Agreement

1. Respondent contends (Br. in Opp. 21-23) that the nonwaivability rule adopted by the Ninth Circuit is

supported by the "mandatory" character of Rules 11(e)(6) and 410. That contention would have force if the rules were "mandatory" in the sense of expressly providing that their waiver is forbidden. But that is not what Rules 11(e)(6) and 410 say. The text of those rules "provides no support for the proposition that Congress intended to ban all * * * waivers." *Evans* v. *Jeff D.*, 475 U.S. 717, 730 (1986). Thus, the rules are "mandatory" only in the sense that they preclude certain conduct by the government *in the absence of the defendant's agreement.* As Chief Judge Wallace correctly recognized (Pet. App. 11a-12a), Rules 11(e)(6) and 410 are no more "mandatory" than the rule providing that the right of the people to be secure against unreasonable searches and seizures "shall not be violated," U.S. Const. Amend. IV; or the rule that no person "shall * * * be subject for the same offence to be twice put in jeopardy of life or limb," U.S. Const. Amend. V. See *Ricketts* v. *Adamson*, 483 U.S. 1, 10 (1987) (double jeopardy rights waivable by pre-trial agreement); see also *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973) (voluntary consent to search renders a search lawful under the Fourth Amendment).

Far from supporting the view that Congress enacted a "waiverless rule," Pet. App. 9a, the language of Rules 11(e)(6) and 410 suggests the opposite conclusion. By providing that statements made in plea discussions ordinarily are inadmissible "against the defendant," the Rules indicate that criminal defendants are the intended beneficiaries of their exclusionary provisions. Compare *Evans* v. *Jeff D.*, 475 U.S. at 730-731 (by providing that fees may be recovered by a "prevailing party," 42 U.S.C. 1988

evinces Congress's intent to confer a private right on those parties, which those parties may freely waive); see also *Venegas* v. *Mitchell*, 495 U.S. 82, 88 (1990) (same). Because the exclusionary provisions were enacted "for the protection of the party against whom [the evidence] is * * * to be used," it "is not to be doubted that he may waive them." *Shutte* v. *Thompson*, 82 U.S. (15 Wall.) 151, 159 (1872).[1]

The conclusion that the protections of the criminal and evidence rules may be waived by parties is confirmed by the structure of each set of rules, because each set expressly contemplates that a defendant who fails to interpose a contemporaneous and specific objection to a trial ruling ordinarily forfeits his right to challenge that ruling on appeal.

[1] *Shutte* involved a statute passed by the First Congress in order to permit depositions of certain infirm witnesses. See Act of Sept. 24, 1789, ch. 20, § 29-31, 1 Stat. 88-90. The defendant in *Shutte* received notice of a deposition to be taken under that statute, and his counsel attended the deposition without objection. At the trial of the cause (after the witness died), the defendant objected to the admission of the deposition on the ground that it was taken without complying with the statute in several respects, including the fact that the witness did not take the required oath, and that the deposition "was taken before a township justice, and not by any magistrate described in the act of Congress." 82 U.S. (15 Wall.) at 158. This Court agreed with the defendant that "the objections made * * * are quite sufficient to require the rejection of the deposition, if there is nothing in the case to countervail their effect." *Id.* at 159. But the Court found it "obvious" that the provisions made in the statute were for the benefit of the adverse party, and it concluded that the defendant's conduct in permitting the deposition to occur as it did amounted to a waiver of his rights under the statute, despite his later objection at trial. *Ibid.*

See Fed. R. Evid. 103 (a)(1); Fed. R. Crim. P. 51. That principle of forfeiture is such a fundamental rule of litigation that this Court repeatedly has emphasized that "'[n]o procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States* v. *Olano*, 113 S. Ct. 1770, 1776 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). See also *Peretz* v. *United States*, 111 S. Ct. 2661, 2669 (1991).

The court of appeals attempted to reconcile its holding with that settled forfeiture principle by stating that the right it found nonwaivable by contract is forfeited at trial if a defendant fails to object, since a failure to object "implicitly waive[s] the protection." Pet. App. 10a n.4. In opposing certiorari, respondent also suggested that forfeitures that result from a defendant's failure to assert a right at trial should be distinguished from contractual waivers. See Br. in Opp. 2 n.1. But neither respondent nor the court of appeals has explained why it is sensible to believe that Congress intended to allow forfeiture, but to forbid a contractual waiver—*i.e.*, to allow an "implicit[] waiver[]," Pet. App. 10a n.4, but to forbid an explicit one.

Under the Ninth Circuit's analysis, a defendant whose attorney fails to object under Rules 11(e)(6) and 410 to the admission of evidence of plea discussions forfeits any right to claim on appeal that the rules were violated, unless he demonstrates a miscarriage of justice amounting to plain error. See

United States v. *Olano*, 113 S. Ct. at 1779-1781.[2] That is so even though the defendant is not aware of the legal consequences of his counsel's inaction, and even though counsel may not even have realized that there were possible grounds for objection. Yet, under the court of appeals' rule, a defendant is not permitted to agree expressly to the introduction of the same evidence, even when, as here, he has done so knowingly and intelligently after consulting with his counsel. No precedent of this Court supports such an anomalous doctrine.[3]

[2] Under any view of the evidence in a case like this, the defendant has made a criminally false statement with respect to the very subject of his testimony, because he either lied to the prosecutor, see 18 U.S.C. 1001, or committed perjury at trial, see 18 U.S.C. 1621. Making the jury aware that the defendant is a person who lies can only increase the reliability of the verdict. See *Jenkins* v. *Anderson*, 447 U.S 231, 238 (1980). For that reason we doubt that impeaching a defendant with his prior inconsistent statements to the prosecutor could ever meet the plain-error standard.

[3] The court of appeals also suggested (Pet. App. 9a) that the general rule that permits forfeiture of even the most fundamental rights has no application here, because that general rule has been developed by this Court in the course of defining the scope of constitutional rights. That analysis, which respondent embraced at the petition stage (Br. in Opp. 24-25), is doubly flawed. First, as *Olano* demonstrates, the general rule applies not only to constitutional rights, but also to "*right[s] of any other sort*," 113 S. Ct. at 1776 (emphasis added), including those conferred by the Federal Rules of Criminal Procedure. Second, and more fundamentally, the court of appeals' analysis confuses the nature of the right at issue with its waivability. A knowing and intelligent guilty plea, for example, is commonly understood to give rise to a lawful conviction. But the Court has never suggested that that is so because the plea may be viewed as the "trial[] by an impartial jury" that the Sixth Amendment guarantees. Instead, the Court has recognized that a valid plea is a knowing and intentional relinquishment of the defendant's right to have his guilt determined by a jury—*i.e.*, a waiver. See, *e.g.*, *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969).

2. The Ninth Circuit's reasoning in this case would have grave consequences for analogous issues under other evidentiary rules. As leading commentators have recognized, "courts give the parties great freedom to waive rules or even to construct new procedures under the doctrine of stipulations," and "[t]here seems to be no reason why this policy should not be extended to the rules of evidence." 21 Charles Alan Wright & Kenneth W. Graham, *Federal Practice and Procedure* § 5039, at 207 (1977) [hereinafter Wright & Graham, *Federal Practice*]; see also 1 John Henry Wigmore, *Evidence In Trials At Common Law*, § 7a, at 576 (P. Tillers ed. 1983) [hereinafter Wigmore, *Evidence*]("any rule of evidence may be waived during litigation, either by deliberately refraining from invoking its enforcement or by stipulation").[4] In reliance on that principle, parties

[4] Commentators have distinguished between agreements that modify or suspend specific rules of evidence after litigation has commenced (by the filing of a complaint or an indictment), and agreements (almost always in commercial contexts), that create and govern the relationship between the parties, and incidentally provide that a party will waive evidentiary rules or other statutory trial rights in the event litigation ensues. Courts and commentators have on occasion found problematic the latter type of agreement, which is not at issue here, although Wigmore was a strong advocate of its validity. See Wright & Graham, *Federal Practice* § 5039, at 206; see also Wigmore, *Evidence* § 7a, at 559-560.

Agreements of the former type, which are analogous to the post-indictment agreement at issue here, are usually denomi-

frequently stipulate in advance of trial to the qualifications of an expert, to the admission of otherwise privileged documents, or to the admission of a writing that is not the "best evidence" or that does not otherwise comply with the authentication requirements prescribed by the rules. See Fed. R. Evid. 701-703, 501, 1002, 901. See generally Note, *Contracts to Alter the Rules of Evidence*, 46 Harv. L. Rev. 138, 139 (1932); 83 C.J.S., *Stipulations* § 10, at 19 (1953 & Supp. 1993); 73 Am. Jur. 2d, *Stipulations* § 17, at 555-557 (1974 & Supp. 1994).

Agreements that waive the requirements of the hearsay rules with respect to specific evidentiary materials are particularly instructive. Like Rules 11(e)(6) and 410, the hearsay rules categorically provide that certain out-of-court statements are "not

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nated "stipulations," and are almost universally assumed to be valid, even when entered into by counsel without the client's participation or express concurrence. See Wright & Graham, *Federal Practice* § 5039, at 206 ("Although there is little appellate litigation on the limits of the power of the parties to stipulate, the practice is well-defined by custom and should present few problems under the Rules."); see also 83 C.J.S., *Stipulations* § 9, at 11 (1953 & Supp. 1993). Indeed, stipulations are give *more* binding effect than ordinary contracts, because frequently they are enforced even when consideration is lacking. See 83 C.J.S., *Stipulations* § 1, at 2. Because respondent personally agreed to the government's use of his statements for impeachment, and because his agreement was supported by consideration (the commitment of substantial government resources to entering into discussions about a possible cooperation agreement, see pp. 26-27, *infra*), this case does not require the Court to decide the extent to which agreements to vary evidentiary rules may be enforced in the absence of consideration or of the defendant's express concurrence.

admissible." See Fed. R. Evid. 802. Yet it has long been common practice for parties in criminal and civil cases to dispense with a witness's live testimony by agreeing in advance of trial to the testimony that the live witness would have given if called to testify. See 83 C.J.S., *Stipulations* § 10, at 20; 73 Am. Jur. 2d, *Stipulations* § 17, at 556-557. Such a stipulation is analytically indistinguishable from the waiver at issue in this case: It is an agreement to place before the jury the affidavit of the witness, which is "not admissible" otherwise. No court has ever suggested that the hearsay rules categorically forbid that commonplace and sensible device. See *The Sac and Fox Indians*, 220 U.S. 481, 488-489 (1911) (Holmes, J.) ("of course evidence, hearsay or *ex parte*, for instance, may be admitted by consent * * * and then should be given whatever weight it would have but for technical rules").

B. Respondent Has No Valid Defense To Enforcement of His Agreement With The Government

Agreements to vary evidentiary requirements in a pending case are, of course, subject to supervision by the courts (as are plea agreements), and a court therefore has the authority to release a party from his pretrial agreement upon an appropriate showing. See 83 C.J.S., *Stipulations* §§ 34-35, at 88-93. Ordinarily, a party may avoid his pretrial agreement by establishing any well-recognized defense to the enforcement of contractual obligations, such as fraud, mistake, mental incompetency, unconscionability, or

violation of public policy.[5] See *ibid.*; see also 73 Am. Jur. 2d, *Stipulations* § 13, at 548-549. And, quite apart from contractual doctrines of avoidance, a court has discretion to decline even a unilateral waiver of a right by a defendant, when acceptance of the waiver would cast the administration of justice into disrepute. See, *e.g.*, *Wheat* v. *United States*, 486 U.S. 153, 160-162 (1988) (while right to counsel may be waived, court may decline a defendant's waiver of his right to conflict-free counsel, because the conflict of interest

[5] Traditional contract doctrine permits a court to decline enforcement of a fully bargained and otherwise valid agreement if enforcement would violate public policy, as when parties contract for conduct that violates the criminal law. See Restatement (Second) of Contracts ch. 8 (1981); E. Allan Farnsworth, *Contracts* ch. 5 (1982). As this Court recently explained:

> That doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interest in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements.

Paperworkers v. *Misco, Inc.*, 484 U.S. 29, 42 (1987). The doctrine, however, voids only contracts that violate "some explicit public policy" that is "well defined and dominant," *W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 766 (1983), and the public policy "is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *Ibid.* (quoting *Muschany* v. *United States*, 324 U.S. 49, 66 (1945)). See generally G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 Calif. L. Rev. 433 (1993) (critical survey of cases raising public policy claims).

could "invite[] disrespect for the integrity of the court"); cf. *Singer* v. *United States*, 380 U.S. 24, 34-35 (1965). Thus, for example, no court would preside over a determination of guilt by crystal ball simply because the defendant was agreeable.

Respondent has never claimed that the government's use of his plea statements to impeach his contrary trial testimony distorted the truth-finding function of a trial in a way that diminishes the public reputation of judicial proceedings. Indeed, it is difficult to imagine how the admission of lawfully obtained evidence that increases the reliability of the verdict could cast the judiciary into disrepute. Nor has respondent ever claimed that anything specific to his circumstances renders his agreement with the government invalid under ordinary principles of contract law; he has made no claim, for example, that the facts of this case give rise to any defense based on fraud, mistake, mental incompetency, or unconscionability. Respondent's sole claim, which the court of appeals accepted, is that an agreement that waives a defendant's rights under Rules 11(e)(6) and 410 is *always* invalid, because it contravenes the public policy favoring plea bargaining.

The public policy defense, however, does not help respondent's cause. To begin with, respondent can derive no persuasive support from cases decided under the Fair Labor Standards Act (FLSA), on which he primarily relies (Br. in Opp. 9). Those cases confirm that "the question of whether [a] statutory right may be waived depends upon the intention of Congress as manifested in the particular statute." *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 705 (1945). In the FLSA setting, the Court has found that Congress

intended to preclude waiver, because the whole point of the Act was to "prevent private contracts" that divested employees of statutory entitlements, such as minimum wages. *Id.* at 706-707. In addition, exceptions to coverage that would result from individual waivers of statutory protections under the FLSA "would affect many more people than those workers directly at issue * * * and would be likely to exert a general downward pressure on wages in competing businesses." *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290, 302 (1985). Individual waivers of FLSA protections thereby implicate interests of other members of the public.

By contrast, as we have already explained, the language of Rules 11(e)(6) and 410 and basic forfeiture principles establish that those two rules confer purely personal rights that may be waived by a defendant. Respondent has cited nothing in the text, structure, or legislative history of Rules 11(e)(6) and 410 that establishes that the whole point of those rules was to preclude bargaining over the admissibility of plea statements, as distinguished from merely providing a background rule that would govern in the absence of a contrary agreement by the parties. Nor has respondent seriously suggested that a decision by an individual defendant to waive the inadmissibility of his plea statements for impeachment purposes implicates the interests of *other* defendants, or that parties to litigation have a public duty to enforce evidentiary rules, as opposed to a private interest in doing so. Cf. *Town of Newton* v. *Rumery*, 480 U.S. at 395 (waivability of cause of action under 42 U.S.C. 1983 is supported by the fact that the putative plaintiff "had no public duty to institute a [Section] 1983 action

merely to further the public's interest in revealing police misconduct"). In short, whereas the structure and history of the FLSA demonstrate that Congress intended to forbid waivers of rights conferred by that Act, respondent cannot demonstrate that Congress evinced that same intention with respect to the rules at issue here.

Moreover, respondent's argument derives no greater support from more general considerations of public policy, on which the Ninth Circuit heavily relied in reversing respondent's conviction. We do not, of course, disagree with the court's view that public policy favors plea bargaining. See Fed. R. Crim. P. 11(e)(1). The court, however, was wrong to conclude that plea bargaining is hampered by agreements that permit the government to use a defendant's plea statements for the limited purpose of impeaching his later contrary testimony at trial. In addition, the court's conclusion that such agreements are void seriously disserves the public interest in obtaining a defendant's cooperation in the investigation and prosecution of others, see 18 U.S.C. 3553(e) (authority to impose sentence below statutory mandatory minimum to reflect defendant's substantial assistance in the investigation or prosecution of others); *Wade* v. *United States*, 112 S. Ct. 1840 (1992), as well as the compelling public interests in the presentation of truthful evidence in criminal trials and "in having the guilty brought to book." *United States* v. *Blue*, 384 U.S. 251, 255 (1966); see also *Kaufman* v. *United States*, 394 U.S. 217, 240-241 (1969) (Black, J., dissenting).

1. The initial error in the Ninth Circuit's assessment of the relevant public policies flows from its

failure to appreciate the context of respondent's meeting with the prosecutor. The point of that meeting was to permit the prosecutor to assess whether respondent's involvement in drug trafficking had endowed him with information that could be useful in the investigation or prosecution of others—*i.e.*, to weigh the advantages of entering into a cooperation agreement with respondent. That is different from the more traditional role of plea bargaining, which is not primarily to secure evidence against others, but to agree on a charge to which the defendant might plead guilty in order to reduce the expenses and risks that both sides ordinarily incur in a trial of the charges. See *Santobello* v. *New York*, 404 U.S. 257, 261 (1971); see also *Mabry* v. *Johnson*, 467 U.S. 504, 508 & n.8 (1984); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978). Thus, as one commentator has noted, "deals involving promises to cooperate are sharply different from the general phenomenon of plea bargaining." Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 Vand. L. Rev. 1, 3 (1992).

The cooperation context has several important consequences. To begin with, in many cases involving cooperation it will be difficult to assess before negotiations are under way whether the defendant's guilty plea will be the subject of bargaining, or whether he instead is interested only in exchanging his cooperation for immunity.[6] Both sides therefore

[6] Discussions about a person's possible cooperation with the authorities overlap only coincidentally with discussions about the possibility of a guilty plea. The possibility of cooperation can arise well before a person has been charged with any crime. When that occurs, defense counsel will frequently offer his client's cooperation to the authorities in exchange for some form of transactional immunity. See generally Larry D. Thompson & Phyllis B. Sumner, *Structuring Informal Immunity*, 8 Crim. Just. 16, 20-21 (Spring 1993) (advising defense bar on how to negotiate with prosecutors in that context). Because prosecutors are often reluctant to strike any immunity bargain without hearing from the putative witness, it is common for a prosecutor to conduct an off-the-record session with the witness and his counsel, pursuant to an agreement that parallels the agreement that respondent made with the government in this case respecting the admissibility of his statements—*i.e.*, providing that statements made by the witness during the interview may not be used in the government's direct case, but may be used "for cross-examination, rebuttal, or as leads to other evidence." *Id.* at 19.

After a person is indicted, it may become harder for him to exchange his cooperation for transactional immunity, because the government has made a prima facie judgment that he was sufficiently involved in the misdeeds under investigation to merit some criminal sanction. He is then more likely to cooperate in exchange for a reduction in sentence pursuant to 18 U.S.C. 3553(e) or Sentencing Guidelines § 5K1.1. Nonetheless, if the prosecutor's need for the defendant's testimony or undercover work is particularly compelling, the defendant may still succeed in obtaining non-statutory transactional immunity, even after the initial charging decision has been made. See generally Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 Vand. L. Rev. at 5-6, 13-15.

share a strong interest in agreeing in advance on the consequences that may flow from their meeting, and thereby guard against the possibility that the meeting will later be characterized by a court, with the benefit of hindsight, in a manner that defeats the *ex ante* expectations of one of the parties. An agreement outlining the extent to which the defendant's statements will be admissible at any later trial thus serves the important interest in avoiding

later disputes concerning the nature and purpose of the meeting, and its consequences for admissibility.[7]

In addition, a prosecutor's decision to meet with a defendant and his counsel for the time necessary to evaluate proffered cooperation ordinarily entails a significant commitment of prosecutorial resources, not only for the prosecutor himself, but also for investigative agents who must be present during the

[7] We do not dispute, for purposes of proceedings in this Court, that the meeting between respondent and the prosecutor, as it actually developed, was a "plea discussion[]" within the meaning of Rules 11(e)(6) and 410. Our point is simply that discussions about cooperation may or may not turn out to involve discussions about a plea, and that in the absence of a prior agreement either party might be surprised by how a court later chooses to characterize the discussions. Thus, in one reported case, statements made by a defendant at a conference with the prosecutor were ruled admissible without restriction, because the court found that the meeting was not "a plea bargaining conference but an effort by [the defendant] to convince the government that he was not guilty of any crime." *United States* v. *Cunningham*, 723 F.2d 217, 227-228 (2d Cir. 1983), cert. denied, 466 U.S. 951 (1984); see also *United States* v. *Robertson*, 582 F.2d 1356, 1365-1368 (5th Cir. 1978) (en banc) (discussing criteria for distinguishing plea discussions from other discussions under prior version of Rules 11(e)(6) and 410).

Viewed from the perspective of both parties at the time ground rules for the meeting are laid down, the agreement is similar to the settlement of a legal claim that later litigation may or may not prove to be meritorious. See *Town of Newton* v. *Rumery*, 480 U.S. at 395-396 (plurality opinion); *id.* at 399 (O'Connor, J., concurring in judgment). The Ninth Circuit's per se rule against waiver of a defendant's rights under Rules 11(e)(6) and 410 invites wasteful collateral litigation about the proper characterization of such cooperation meetings in specific circumstances.

interview, prison officials who must make the defendant available when he is incarcerated, and foreign language interpreters who must be present when the defendant is not fluent in English. Meetings with a defendant and his counsel to assess proffered cooperation frequently will occupy a day in the schedule of the prosecutor and the law enforcement agents involved, and still more time to check the defendant's story against other leads. Because a prosecutor cannot allocate those resources to every defendant who expresses a possible desire to cooperate with the government, the prosecutor must choose those prospects that are most likely willing to furnish truthful information. The impeachment agreement condemned by the court of appeals provides some assurance that the defendant will take his obligation to give a truthful proffer seriously, and it is an important inducement for the prosecutor's decision to meet with a particular defendant. The Ninth Circuit's decision permits a defendant to obtain the full benefit of his bargain—a commitment of substantial government resources to discussion of a possible cooperation agreement—while being relieved of the burden of complying with his side of the deal.

Finally, and most important, the fact that the information conveyed by the defendant during a discussion about cooperation is intended to be used in other investigations (often including potentially life-threatening undercover work by law enforcement officers) and other prosecutions gives the prosecutor an additional and compelling interest in its veracity that is not present in more traditional plea bargaining situations. A prosecutor often may be unable to judge the value of the defendant's information to other

investigations, or the value of his testimony in other trials, without extensively questioning the defendant as part of "plea discussions" under Rules 11(e)(6) and 410. But the prosecutor may justifiably be unwilling to use the facts proffered by the defendant as the basis for charging or convicting other persons if the defendant wishes to retain the ability to change his story under oath when his own liberty is at stake.[8] It is reasonable for a prosecutor to conclude that a defendant who is willing to cooperate in the prosecution of others only on those terms has little of value to offer to the government. By effectively freeing suspects and criminal defendants to take casually the truth of their statements to the prosecutor, the court of appeals has significantly impaired the government's ability to obtain reliable information from cooperating witnesses.

2. The Ninth Circuit's analysis also reflects little consideration of the untoward incentives that its ruling creates for criminal defendants. Under the court's holding, a defendant will be free to use his proffer of cooperation merely as an opportunity to "try out" a story on the prosecutor. That tactic will permit the defendant to gain the best of all worlds:

[8] If the government lacks effective means of policing the truthfulness of the information proffered by the defendant—such as the protection supplied by the agreement condemned by the court below—the defendant's testimony will be subject to ready impeachment when the government attempts to use it in the prosecution of others. To the extent the cooperator's testimony is nonetheless credited by a jury, the absence of such a necessary check on its veracity may increase the number of instances in which the prosecutor unwittingly presents, and a jury consequently relies on, false testimony—thereby seriously disserving important constitutional values.

favorable treatment if the prosecutor is persuaded, and an opportunity to swear to a different version of the events at his trial (without fear of contradiction and aided by any facts he learns during the proffer session) if the prosecutor is not persuaded.[9] The court of appeals' truncated assessment of the policy considerations that are implicated by a waiver of rights under Rules 11(e)(6) and 410 therefore allows criminal defendants to pervert those rules "into a license to use perjury by way of a defense," *Harris* v. *New York*, 401 U.S. 222, 226 (1971), and "to frustrate the truth-seeking function of a trial by presenting tailored defenses insulated from effective challenge." *Doyle* v. *Ohio*, 426 U.S. 610, 617 n.7 (1976). That result is flatly contrary to the fundamental canon governing interpretation of the Rules of Evidence and Criminal Procedure—*i.e.*, that they "shall be construed to secure fairness in administration * * * to the end that the truth may be ascertained and proceedings justly determined." Fed. R. Evid. 102; see also Fed. R. Crim. P. 2.

3. The Ninth Circuit's conclusion that plea bargaining will be hampered by a waiver of the rights conferred by Rules 11(e)(6) and 410 is also unsound on

[9] That is exactly what respondent attempted to do in this case. After failing to persuade the prosecutor, respondent not only testified to a completely different version of his involvement in methamphetamine trafficking, but he also took care to admit that he had been present on Shuster's property on the day before his arrest—and thereby attempted to neutralize the surveillance evidence about which he learned during the meeting. Indeed, defense counsel argued in summation that the jury should believe respondent's story because that story was confirmed by the government's own surveillance evidence. Tr. 420.

its own terms. A defendant has no right to a bargained plea, see *Weatherford* v. *Bursey*, 429 U.S. 545, 561 (1977), and he cannot complain if the government prefers to have his guilt determined by the jury trial to which the Constitution entitles him, *ibid.* Because plea bargaining can occur only if both sides are agreeable, it is illogical to suppose that judicial rulings that make the prosecutor significantly less willing to engage in the plea bargaining process will increase the incidence of its occurrence. It is far more plausible to conclude that plea bargaining will be advanced when the parties themselves are permitted to agree to the terms on which it will be conducted.

The Ninth Circuit attempted to justify its per se rule of non-waivability on the ground that courts must protect "a defendant who is in a weak bargaining position" in order to prevent governmental overreaching. Pet. App. 9a. This Court, however, has always proceeded on the assumption that "the mutuality of advantage," *Bordenkircher* v. *Hayes*, 434 U.S. at 363, inherent in plea bargaining means that "the prosecution and defense * * * arguably possess relatively equal bargaining power." *Id.* at 362 (quoting *Parker* v. *North Carolina*, 397 U.S. 790, 809 (1970) (opinion of Brennan, J.)); see also *United States* v. *Goodwin*, 457 U.S. 368, 377-378 (1982). For that reason, the best protection against the possibility of abuse is the adversarial process of bargaining itself. A defendant who has the assistance of competent counsel, as respondent did, can always deal with practices he regards as abusive by electing to exercise the rights that the prosecutor wishes him to abandon—*i.e.*, by refusing to cooperate with the

government and by insisting on his right to stand trial. See *United States* v. *Goodwin*, 457 U.S. at 378. And if negotiations break down, the defendant is free to go to trial, burdened only by the knowledge that if he testifies inconsistently with his proffer statement, the prosecutor will be free to impeach him with his prior inconsistent statement. That burden does not differ significantly in kind or degree from other factors that a defendant must consider in deciding whether to testify,[10] and it certainly does not make it

[10] A defendant who contemplates testifying in his own behalf is faced with analogous disincentives, which (like the agreement invalidated by the Ninth Circuit) uniformly are intended to further the compelling public interest in the truth-finding function of the trial. Once a defendant takes the stand, he cannot claim his Fifth Amendment privilege to avoid cross-examination on matters reasonably related to the subject of his direct examination. See, *e.g.*, *Brown* v. *United States*, 356 U.S. 148, 154-156 (1958); *Johnson* v. *United States*, 318 U.S. 189, 195 (1943); *Fitzpatrick* v. *United States*, 178 U.S. 304, 314-316 (1900). He may also be impeached by proof of prior convictions, see, *e.g.*, *Marshall* v. *Lonberger*, 459 U.S. 422, 437-438 (1983); *Spencer* v. *Texas*, 385 U.S. 554, 560-561 (1967); Fed. R. Evid. 609, by prior inconsistent statements taken in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), see, *e.g.*, *Oregon* v. *Hass*, 420 U.S. 714 (1975); *Harris* v. *New York*, *supra*, by prior inconsistent statements taken in violation of *Michigan* v. *Jackson*, 475 U.S. 625 (1986), see, *e.g.*, *Michigan* v. *Harvey*, 494 U.S. 344, 351-353 (1990), by physical evidence seized in violation of the Fourth Amendment, see, *e.g.*, *United States* v. *Havens*, 446 U.S. 620, 626 (1980), and by general evidence of bias, see, *e.g.*, *United States* v. *Abel*, 469 U.S. 45, 50-51 (1984). He may also open the door to the admission of evidence of prior uncharged wrongs, see, *e.g.*, *Huddleston* v. *United States*, 485 U.S. 681 (1988); Fed. R. Evid. 404(b). And if his motion for acquittal at the close of the government's case is denied, he risks bolstering the government's case sufficiently to support

more likely that the trial will produce an unreliable result. Because the parties are free to negotiate over the terms of the waiver, it is difficult to see why the availability of a waiver as one of the options for the parties to bargain over is inherently abusive, or why it warrants the broad per se rule adopted by the Ninth Circuit.

Moreover, as Chief Judge Wallace pointed out (Pet App. 17a-18a), the court's assumption that prosecutors will engage in abusive practices is contrary to this Court's teaching that "tradition and experience justify our belief that the great majority of prosecutors will be faithful to their duty." *Town of Newton* v. *Rumery*, 480 U.S. 386, 397 (1987); see also *id.* at 395, 396. In light of that understanding, this Court has repeatedly declined to fashion per se rules that outlaw prosecutorial practices merely because of the abstract possibility that abuses may occur in isolated cases. See *id.* at 396-397; *United States* v. *Goodwin*, 457 U.S. at 384. The broad per se rule of non-waivability adopted by the court of appeals is an unwarranted departure from that consistent course of decision.

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an otherwise legally insufficient verdict of guilty. See, *e.g.*, *United States* v. *Calderon*, 348 U.S. 160, 164 (1954). The possibility that the government may impeach the defendant's trial testimony with plea statements, which only arises if he enters into the agreement with the intent to lie either to the prosecutor or the trial jury, cannot "add[] in any substantial manner to the inescapable embarrassment which the accused must experience in determining whether he shall testify or not." *Raffel* v. *United States*, 271 U.S. 494, 499 (1926).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Rule 102, Fed. R. Evid., provides:

Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Rule 410, Fed. R. Evid., provides:

Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if

the statement was made by the defendant under oath, on the record and in the presence of counsel.

Rule 2, Fed. R. Crim. P., provides:

Purpose and Construction

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Rule 11(e)(6), Fed. R. Crim. P., provides:

(6) *Inadmissibility of Pleas, Plea Discussions, and Related Statements.* Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a

criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.